83-5509

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CHARLES WILLIAM PROFFITT,

CROSS-PETITIONER,

V.

LOUIE L. WAINWRIGHT,

CROSS-RESPONDENT.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether certiorari should be granted to decide if defense counsel's failure to present any information concerning a capital defendant's background and character at sentencing and his mishandling of psychiatric evidence violates the defendant's Sixth and Eighth Amendment rights to the effective assistance of counsel?

2. Whether certiorari should be granted to decide if a district judge may overrule a magistrate's finding of ineffective assistance of counsel, where the magistrate heard the witnesses at an evidentiary hearing and the district judge did not?

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Cross-petitioner Charles W. Proffitt respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit denying habeas corpus relief on the ground that Mr. Proffitt was denied the effective assistance of counsel at the sentencing stage of his capital trial, and was denied his right to due process of law when the district judge, without hearing the witnesses, rejected a magistrate's recommendation that habeas relief be granted.

OPINIONS BELOW

The Report and Recommendation of the United States Magistrate recommending that habeas relief be granted on the ground that Mr. Proffitt was denied the effective assistance of counsel at the sentencing stage of his capital trial was filed July 7, 1980, and appears in cross-respondent's appendix to the

petition for writ of certiorari at A-223. The unreported opinion of the district court denying habeas relief was filed November 7, 1980 and appears at A-362 of the appendix to cross-respondent's petition for writ of certiorari. The opinion of the Eleventh Circuit granting partial habeas relief but denying relief on the grounds raised in this cross-petition was issued on September 10, 1982. A dissent on the ineffective assistance claim was issued on September 17, 1982. Both are reported at 685 F.2d 1227 (11th Cir. 1982), and appear at A-1 of the appendix to cross-respondent's petition for writ of certiorari. An order modifying the court's opinion on cross-respondent's petition for rehearing, reported at 706 F.2d 311 (11th Cir. 1983), appears at A-218 of the appendix to cross-respondent's petition for writ of certiorari. Cross-respondent's petition for rehearing en banc was denied, no member of the circuit court having requested a poll. 708 F.2d 734 (11th Cir. 1983).

JURISDICTION

The opinion of the court of appeals sought to be reviewed was entered on September 10, 1982. A timely petition for rehearing was denied on May 31, 1983. On August 19, 1983, Justice Powell granted cross-petitioner's application for extension of time to file this cross-petition to and including September 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ...

> to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

the Eighth Amendment to the Constitution which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law ...

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. A-1-4.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Cross-petitioner was convicted of first degree murder in the Circuit Court of Hillsborough County, Florida and sentenced to death on March 25, 1974. On appeal to the Florida Supreme Court, his conviction and death sentence were affirmed. Proffitt v. State, 315 So.2d 461 (Fla. 1975). A petition for writ of certiorari to this Court was granted to consider the constitutionality of the Florida death penalty statute on its face. Proffitt v. Florida, 423 U.S. 1082 (1976). The Court upheld the constitutionality of the statute under the Eighth and Fourteenth Amendments. Proffitt v. Florida, 428 U.S. 242, rehg. den., 429 U.S. 875 (1976).

A petition for writ of habeas corpus was filed in the United States District Court for the Middle District of Florida on June 21, 1979.[1] The district judge referred the matter to a

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1. Cross-petitioner exhausted his state remedies with respect to the issues raised in this petition. Proffitt v. State, 372 So.2d 1111 (Fla. 1979).

magistrate, who conducted an evidentiary hearing on September 25 and 26, 1979. On July 7, 1980, the magistrate issued a report recommending that habeas corpus relief be granted on the ground that cross-petitioner had been denied the effective assistance of counsel at the penalty stage of his bifurcated capital trial, and denied as to all other issues. Objections to the magistrate's Report and Recommendation were filed by both parties. Without hearing the evidence himself, the district judge overruled the magistrate on November 7, 1980, and ordered that habeas corpus relief be denied. Rehearing was denied on November 26, 1980. A certificate of probable cause to appeal was granted on December 17, 1980.

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed in part, reversed in part, and remanded to the district court. With respect to the issues presented in this cross-petition, a divided panel held that cross-petitioner had not been denied the effective assistance of counsel at the sentencing stage of his capital trial. The court also upheld the propriety of the district judge's action in rejecting the magistrate's recommendation without himself hearing the witnesses.

B. STATEMENT OF THE FACTS[2]

The issues presented in this cross-petition arise from defense counsel's failure to present any mitigating evidence of cross-petitioner's background and personal history at the sentencing phase of his capital trial, and counsel's mishandling of psychiatric evidence at the sentencing stage.

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2. The circumstances of the offense are adequately set forth in the decision of the Florida Supreme Court and will not be repeated here. Proffitt v. State, supra, 315 So.2d at 463.

At the time he was convicted and sentenced to death, Charles Proffitt was twenty-eight years old. Proffitt v. State, supra, 315 So.2d at 467. He had never before been arrested for or accused of an act of violence. (Pet. Ex. 6).[3] He had no prior criminal record, with the exception of one seven year old misdemeanor conviction.[4] Id. He had no history of violent behavior in his background.[5]

Mr. Proffitt, furthermore, had been steadily employed throughout his adult life, and was considered a reliable employee. (Pet. Ex. 9, p. 40; R. 434, 435, App. A below). Mr. Proffitt

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3. References to cross-petitioner's exhibits, admitted in evidence at the habeas hearing, will be designated "Pet. Ex." or "App." followed by the exhibit number or letter. Citations to the record below will be designated "R."; citations to testimony at the habeas hearing will be designated "H.T."; citations to the trial record will be designated "T.R."

4. Mr. Proffitt was convicted in Stamford, Connecticut under Section 53-75, Connecticut General Statutes, a misdemeanor currently classified as criminal trespass. (Pet. Ex. 6). Mr. Proffitt had been found drunk, late at night, in a restaurant. No damage was done to the restaurant, and no property was taken. (R. 438). Mr. Proffitt received a ninety-day suspended jail sentence after pleading guilty to the charge. (Pet. Ex. 6).

5. To the contrary, Mary Bassett, a boarder in the Proffitt home and the State's key witness at trial, testified in a pre-trial deposition that he was a gentle person who "couldn't even kill a puppy that was almost half way dead." (Pet. Ex. 9, pp. 43-44). She had never seen him hit anyone. Id. Mr. Proffitt's wife confirmed this testimony in her pre-trial deposition. (Pet. Ex. 1, pp. 10-11). Both depositions were admitted in evidence at the habeas hearing. Cross-petitioner also submitted below a proffer of testimony of other friends and relatives available at the time of trial, confirming the non-violent nature of Mr. Proffitt's character throughout his life. (R. 434, 437). Evidence submitted also indicated that Mr. Proffitt's behavior since the homicide has remained non-violent. (App. A. below).

The proffer was submitted pursuant to an order of the magistrate and with the agreement of both parties that cross-petitioner would not need to produce the witnesses listed unless cross-respondent disputed the proffer. Although cross-respondent never disputed the contents of the proffer, cross-respondent complained to the district court that the proffer was improperly considered. The district court declined to consider the evidence proffered in overruling the magistrate. While cross-petitioner contends that the proffer was properly before the court below, the mitigating evidence at issue was, in any event, also before the lower court in other forms which were admitted without objection. See e.g., App. A (Clemency memorandum).

was a good provider, and an affectionate husband: both Mr. Proffitt's wife and Mary Bassett, a boarder in their home, testified in their pre-trial depositions that the Proffitts had a generally happy and stable marriage. (Pet. Ex. 1, p. 14, 22; Pet. Ex. 9, p. 39, 40, 44; T.R. 385; R.. 435, 437; App. A.) Mr. Proffitt was also a generous person: he had taken in and was supporting Mary Bassett and her infant child, and had often, at other times in his life, tried to help people in need. (Pet. Ex. 1, pp. 18-19; R. 435-37; App. A).

Mr. Proffitt had achieved this relative stability in his life despite a difficult family background. His father was a severe alcoholic whose drinking left the family destitute. (App. A). Mr. Proffitt married at an early age, but his wife was unfaithful to him, and the marriage ended in divorce. Id. Later, after he had married his present wife, their only child died in infancy. Id.

At the time of trial, the above-mentioned evidence was available to establish that Mr. Proffitt was a non-violent, decent man, for whom the murder was a single aberrational act.[6] None of this evidence was presented to the jury or judge at sentencing. No witnesses were called by defense counsel at the penalty phase of the trial. (T.R. 505). No pre-sentence investigation report was requested or submitted to the trial judge. No oral argument was made describing these mitigating aspects of Mr. Proffitt's background.

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6. On the night of the murder, Mr. Proffitt had been drinking steadily for eight hours. (T.R. 309, 311, 546; R. 434). After the offense, he surrendered himself to his brother, a police officer in his hometown of Stamford, Connecticut. (T.R. 351; R. 437).

Defense counsel's presentation to the jury at the penalty stage was limited to the cross-examination of Dr. James Crumbley, a physician Mr. Proffitt had seen when he requested psychiatric assistance at the Hillsborough County Jail. (R. 410). Crumbley, an employee of the Hillsborough County Sheriff's Department, id., was called by the State to testify concerning statements made to him by Mr. Proffitt to the effect that he had committed the murder because of an uncontrollable urge to kill, and that Mr. Proffitt feared he would kill again.[7] (T.R. 497, et seq.). Crumbley was allowed to testify only because defense counsel expressly waived cross-petitioner's patient-physician privilege with respect to his statements to Crumbley.[8] (T.R. 495).

On cross-examination, defense counsel, Rick Levinson elicited from the doctor his opinion that Mr. Proffitt was mentally disturbed. The prosecutor was able to undermine completely this "expert" opinion, however, establishing from Dr. Crumbley that (1) he was not a licensed psychiatrist or psychologist; (2) he had only seen Mr. Proffitt twice, for fifteen or twenty minutes; and (3) he had not performed any diagnostic test to support his opinion. (R. 501).

Prior to allowing Dr. Crumbley to testify, Levinson had undertaken no preparation for the presentation of

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7. Dr. Crumbley's testimony at the sentencing stage had nothing to do with the statutory aggravating factors, but Levinson did not object to this clear violation of state law.

8. Dr. Crumbley had assured Mr. Proffitt before he spoke with him that everything he said was privileged and would not be used against him. (T.R. 400, 401). Defense counsel succeeded in blocking Dr. Crumbley's testimony at the guilt stage of the trial based on the physician-patient privilege but then waived the privilege and allowed the doctor to testify for the State at the penalty stage. (T.R. 420, 497).

psychiatric evidence. (H.T. 181, 265). Levinson had first learned on the night before the trial that Mr. Proffitt had sought psychiatric help from Dr. Crumbley, when Dr. Crumbley called Levinson to express his opinion that Mr. Proffitt was seriously disturbed.[9] (H.T. 194, 258, 261). Levinson had never before questioned Mr. Proffitt's mental state.[10] (H.T. 181, 265). Levinson did not attempt to learn the basis for the doctor's opinion, or explore with him the possibility of presenting a psychiatric defense at the guilt or penalty stages of the trial. (H.T. 301). He did not attempt to obtain an expert evaluation of his client or expert advice on the validity of Crumbley's opinions. (H.T. 176, 184). After receiving Dr. Crumbley's telephone call, Levinson took no action to determine whether Mr. Proffitt was, in fact, mentally disturbed so that he could either (a) present that information to the sentencer through a qualified expert or (b) know whether Dr. Crumbley's opinion, if offered, could be persuasively rebutted. Nonetheless, Levinson allowed Crumbley to testify at trial.

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9. Dr. Crumbley informed Levinson that he believed it his duty to tell the prosecutor that Mr. Proffitt had confessed the offense to him, and feared he might do harm to someone else if acquitted and released. Levinson's "only concern" after receiving the phone call was whether he would be able to keep the doctor from testifying during the guilt stage of the trial. (H.T. 249, 255).

10. Levinson testified that he did not question his client's mental state because Mr. Proffitt had appeared lucid to him during his visits to the jail. (H.T. 181, 265). Levinson was not aware that Mr. Proffitt was heavily medicated during those visits, nor did he know that his client had attempted suicide and was being held without clothes. (H.T. 257).